United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7380

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR F. TURCO, JR.,

Plaintiff-Appellant,

v.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants-Appellees.

Civil Appeal
Docket No. 76-7380

REPLY BRIEF ON BEHALF OF APPELLANT

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

Attorneys for Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR F. TURCO, JR.,

Plaintiff-Appellant,

v.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants-Appellees.

Civil Appeal
Docket No. 76-7380

REPLY BRIEF ON BEHALF OF APPELLANT

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Table of Cases and Authorities - cont'd

Other Authorities

REPLY BRIEF ON BEHALF OF APPELLANT

The essence of appellant's complaint in the District Court is that the procedures employed in his disbarment proceedings in the State courts were violative of his constitutional rights. The statement of the issues presented for review delineates those questions. Obviously appellant did not expect the District Court to re-evaluate any factual matters considered by the State court, nor did he even seek such relief. The sole and entire thrust of his complaint was his claim of procedural deficiencies in the State court proceedings.

The briefs submitted in response raise jurisdictional questions and in the main ignore the issue of deficiency in procedures. Appellant submits this reply in response to both the brief filed by the Bar Association and that filed by the Appellate Division defendants.

I.

THE JURISDICTIONAL ISSUE.

Both briefs argue that the lower court either had no jurisdiction over this matter, or should have abstained, or was in any event barred by a doctrine of res judicata.

Since these concepts have been referred to with some degree of confusion, it seems appropriate to analyze what is and what is not involved in this litigation.

1. In this case, the State court proceedings were completed before the Federal court proceedings commenced.*/ Thus there is no issue of abstention growing out of interference with pending proceedings. That facet of abstention--commonly referred to as abstention in the comity sense--applies when relief is sought in the Federal court to intervene in a pending State court proceeding. See, Erdmann v. Stevens, 458 F. 2d 1205 (2nd Cir., 1972), cert. den., 458 F. 2d 1205; Anonymous v. The Association of the Bar of the City of New York, 515 F. 2d 427 (2nd Cir., 1975).

This distinction is meticulously pointed out in the Supreme Court's opinion in Hoffman v. Pursue, Ltd., 420 U.S. 592, 606 (1975):

> "The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state court dispositions of federal questions."

The Bar Association brief recognizes this point at page 13; the Appellate Division's brief seems never to come to grips with this distinction.

2. The Bar Association brief, however, suggests (ibid.) that Mildner v. Gulotta, 405 F. Supp. 182 (E.D. N.Y., 1975),

*/ That a petition for writ of certiorari to the Supreme Court of the United States was filed after the District Court complaint was filed obviously does not keep alive a State court proceeding unless the petition is granted. In any event, that petition was denied long before the District Court made its judgment here.

aff'd. 47 L. Ed. 2d 751, stands for the proposition that abstention applies even to completed proceedings. But a reading of the court's opinion in that case shows without question that at issue there was another facet of abstention, namely, a requirement that a federal litigant shall have at least offered the constitutional issue to a State court for determination if there was a preceding State court proceeding. See 405 F. Supp. at 196. This, of course, is a familiar doctrine reiterated time and time again in situations where a litigant is involuntarily */ brought before the State courts: he is required to at least give the State court an opportunity to consider the issue. This is the facet of abstention commonly referred to under the rubric of "unclear state law."

Thus the court in Mildner sum up the issue as follows:

> "... federal plaintiffs who actually are involuntary state defendants, and who have a constitutional defense arising out of state actions, cannot resort to a federal forum prior to seeking a state resolution of the merits of their constitutional claim." 405 F. Supp. at 19[illegible].

In Mildner, the court was of the view that the key constitutional issue had not been offered to the State court

*/ The involuntary nature of the State court proceeding is critical. There are many situations where a litigant has the choice of going to a State or a Federal court. See, Monroe v. Pape, 365 U.S. 167, 183 (1960). And he may well be bound by a State court determination if he elects that remedy. What we are dealing with here, however, are involuntary State proceedings (obviously Mr. Turco did not initiate the disbarment proceedings) and the responsibility in such a proceeding to at least offer the constitutional issue to the State court.

because it had not been pressed in appellate proceedings and no petition for certiorari had been filed.

Neither of those circumstances applies here. Appellant did press his constitutional issues before the State court and indeed filed a petition for writ of certiorari.

3. While the courts have, as indicated above, been careful to avoid interference with pending State court proceedings, and have insisted that in court proceedings which are involuntarily brought against a party, a litigant must at least offer his Federal constitutional issues to the State court to permit it to pass upon those issues, we know of no decision of the Supreme Court which holds that an involuntary defendant in a State court proceeding who does present those issues in State court litigation--and carries them to the end--is for that reason barred by some doctrine of res judicata (or collateral estoppel of "issue preclusion") from presenting those issues to a Federal court in litigation brought under the Civil Rights Act. The Supreme Court indeed, over the objection of two Justices whose dissenting opinion explains the issue, refused to grant a petition for certiorari which argued that point. See, Florida State Board of Dentistry v. Mack, 401 U.S. 960 (1971). While the denial of a petition establishes no rule of law, the dissenting opinion makes clear that the Supreme Court has never suggested such a view.

And indeed on the face of it, no such rule can be adopted as a simple illustration will make clear. Let us suppose that a State determines that trials in cases involving maximum

imprisonment of less than six months shall be conducted without counsel. Let us further assume that a defendant in such a case fully litigates the Sixth Amendment issue in the State courts and petitions the Supreme Court for a writ of certiorari, which is denied. Can it be seriously contended that a Federal court is barred in a subsequent proceeding from even considering the issue? The answer is No, of course, and that is one of the familiar functions of the writ of habeas corpus. See, Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). Can it be seriously suggested that the Federal-State relationship in the adjudication of constitutional issues is different when the State employs a non-criminal process, e.g., when, as here, it acts against the professional livelihood of an individual and disbars him. Such a distinction can have no rational basis and introduces into the issue of the Federal-State relationship in the adjudication of constitutional issues an element of procedural chance which is inconsistent with the development of cohesive principles of Federal-State relationship.

While the Preiser case, supra, is cited for the proposition that principles of res judicata are applicable to a civil rights action brought under 42 U.S.C., §1983, we point out below that the cases cited by the court in that case apply to particular fact patterns which do not describe the instant case.

Section 1983 of 42 U.S.C. became part of our Federal legal system precisely to provide a Federal remedy where Congress conceived that the State courts were not adequately protecting constitutional rights. While the courts have developed a number

of doctrines to encourage presentation of issues to State courts, it has never been suggested that when all that was done, the doors of the Federal court were closed to an involuntary litigant in the State court claiming that the procedure before the State court denied him his constitutional rights although he presented his constitutional issues to the State court. It might well be that a Federal court would consider itself bound by a State court factual finding; it might feel bound by a State court finding in a case where a litigant has voluntarily elected to litigate in the state court; it might feel bound if a State appellate remedy had not been pursued; but it is simply unrealistic to suggest that the Federal court may not consider a claim that the underlying State court procedure was unconstitutional as to an involuntary litigant who has given the State court every opportunity to consider the issue.

None of the cases cited by either of the respondents supports their res judicata claims. Thus, referring to the cases cited by the Bar Association at pp. 16 and 17 of its brief, Tang v. Appellate Division, 487 F. 2d 138 (2nd Cir., 1973), cert. den., 416 U.S. 906, involved the situation where a litigant moved in the District Court before exhausting his appeal within the State system, exactly the issue upon which Mildner, supra, turned; Rosenberg v. Martin, 478 F. 2d 520 (2nd Cir., 1973), cert. den., 414 U.S. 872, involved a previous decision by both a State and a Federal court which had considered the issue on habeas corpus; Thistlewaite v. City of New York, 497 F. 2d 339 (2nd Cir., 1974), cert. den., 419 U.S. 1093, involved a sitaution where the court considered

the litigant had elected to litigate his constitutional issue at the State court level; Lombard v. Board of Education of the City of New York, 502 F. 2d 631 (2nd Cir., 1974), cert. den., 420 U.S. 976 (1975), also involved a situation where the litigant had elected to first litigate in the State court; Brault v. Town of Milton, 527 F. 2d 730 (2nd Cir., 1975), does not even consider the issue and in any event involves a damage action under 42 U.S.C., §1983, after a litigant had elected to sue in a State court and had obtained a verdict for damages; Taylor v. New York City Transit Authority, 433 F. 2d 665 (2nd Cir., 1970), involved a litigant who had elected to present his issue first to the State court.

The cases cited in the Appellate Division brief at page 15 are no more apposite. Coogan v. Cincinnati Bar Assn., 431 F. 2d 1209 (6th Cir., 1970), is a case of a litigant involuntarily before the State court who did not offer to that court the issue he thereafter sought to raise in the Federal court, and is therefore similar to the Mildner case discussed above; Jensen v. Olson, 353 F. 2d 825 (8th Cir., 1965), and Rhodes v. Meyer, 334 F. 2d 709 (8th Cir., 1964), clearly involved situations where the litigant had voluntarily elected to present his issue to a State court; Goss v. Illinois, 312 F. 2d 257 (7th Cir., 1963), involved an effort to use a §1983 proceeding where habeas corpus was obviously the proper remedy.

The argument for the res judicata position essentially comes to the following: After all, following litigation in the State court, if the constitutional issues have been presented

to the State court and the Supreme Court by way of a petition for writ of certiorari, that is an adequate protection against denial of constitutional rights. Judicial economy and the need to terminate litigation call for the application of principles of res judicata.

But the Supreme Court has never conceived of its role as being the correction of errors below. It has never felt that it is required to grant certiorari solely because the court below erred. "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19, Supreme Court Rules. And those special and important reasons refer to the precedential role of the case, not the correction of error.

Except in rare cases, there is no clue to the reasons for denial of a petition for writ of certiorari. The reasons may be bottomed on such matters as the overwhelming docket of the Court or a decision by the Court that the precedential value of the case is not such as to require that the Court address the problem. Sometimes the Court wishes an issue to ripen or mature in litigation in several lower courts before it addresses the issue. And in cases coming up from State courts raising constitutional issues, a frequent reason for denying a petition for writ of certiorari is that the record below does not adequately develop the factual basis for the constitutional determination or that the lower court does not expound upon the issue so as to

give the Supreme Court the benefit of prior judicial evaluation of the issues.

This last factor would be particularly appropriate in a case in which a defendant in a State court proceeding attacks the procedures before that Court. In such a case it is most unusual for a State court to address its own procedural deficiencies. The instant case is a perfect example of that problem, for the Appellate Division decisions in no way hinted at the underlying constitutional deficiencies in its procedures, even though they were raised. And however much the appellant sought to have the court address those questions, it refused to do so.

Thus, the Supreme Court in this case would be most unlikely under any circumstances to consider a petition for writ of certiorari since it did not have the benefit of an articulated expression, with respect to the procedural issues, from the State court. The only way that those issues could ever be fully defined and properly adjudicated would be if a tribunal considered that it had the responsibility of independently adjudicating the constitutional issues. The United States District Court is obviously the first tribunal in this case which could have served that function. To restrict the functioning of the District Court by adopting a doctrine of res judicata in the type of case where, as pointed out above, a State court is particularly unlikely to consider its own procedural deficiencies, is effectively to prevent any full consideration of the issues in any forum.

II.

LAWYERS ALSO HAVE CONSTITUTIONAL RIGHTS.

Short shrift may be made of a theme which is enunciated in both briefs, namely, that because appellant is a lawyer involved in disbarment proceedings there is a special limitation on the power of the Federal courts to review the matter.

We, of course, do not contend that the Federal court may take over the problem of licensing or disciplining attorneys in a State. The issue here is solely the question of procedural constitutional rights in disbarment proceedings. On such a question, the Federal court has jurisdiction and if there are no applicable principles of abstention, the constitutional rights of a lawyer are on no lower or different level than those of other members of the population. See, Spevack v. Klein, 385 U.S. 511 (1967); Erdmann v. Stevens, supra.

III.

THE FAILURE OF EITHER OF RESPONDENTS' BRIEFS TO ADDRESS THE QUESTIONS AS TO THE DENIAL OF DUE PROCESS IN THIS CASE.

The essence of the due process issue falls into several categories.

a) Firstly, appellant was denied a hearing on the underlying question whether the conviction of misdemeanors which were unrelated to attorney misconduct established unprofessional conduct in this case. This is the Baxstrom v. Herald, etc., point in our brief and essentially comes to the following: Whether in a case involving non-automatic judicially determined application

of collateral consequences to a conviction, where there are no standards for the invocation of such consequences, an individual is entitled to a due process hearing on that very issue? That is a fundamental procedural question in this case for the simple reason that not every misdemeanor conviction results in "guilt" of unprofessional conduct. Only some do. Which ones? What are the factors which determined guilt in this case? What is the judicial process by which that determination is made?

This is precisely the kind of issue recently recognized as substantively cognizable in the Federal court in Kimball v. The Florida Bar, 537 F. 2d 130 (5th Cir., 1976). Here the issue in a sense is simpler, since our only concern is whether the State court which is making an individualized judicial determination must do so by a procedure which provides due process of law.

In this case, there was a petition asserting that the appellant was guilty of unprofessional conduct because of his misdemeanor convictions, and an answer which disputed the claim of unprofessional conduct.

It is that contested issue as to which appellant claims he was entitled to a hearing. But the Appellate Division, by a process which is never explained, adjudicated that appellant was "guilty of professional misconduct" on that state of the record, and without a hearing (28a).

The denial of due process is not mitigated by the opportunity to proceed in a mitigation hearing. Such a hearing could relate only to the quantum of punishment; guilt was already

established by the first action of the Appellate Division (ibid.). Any suggestion that the mitigation hearing can be a substitute for a hearing before a determination of "guilt" is really not much different from that proposed by the Queen, "Sentence first, verdict afterward." (Alice's Evidence in Alice in Wonderland.)

b) Secondly, there is an issue as to the adequacy of notice. The petition for disbarment stated that appellant should be disbarred by reason of his conviction of misdemeanors--not by reason of what the prosecutor said she would prove at the time the plea was accepted by the lower court. Yet this was obviously the basis for disbarment (48a).

c) Thirdly, there is an issue of the right of confrontation which arises out of the fact that the Appellate Division rested its decision on the prosecutor's statements. Of course the prosecutor never testified at the mitigation hearing; none of her witnesses was produced; but the Appellate Division relied on her statements and simply ignored the fact that at the time of the plea and in response to the prosecutor's statements, appellant's counsel had stated what he would prove in rebuttal, which contradicted the prosecutor's statements.

Neither of the briefs considers the foregoing procedural constitutional issues which appellant raised before the lower court and in his brief here. Rather, they seek to discuss the case as if the sole question raised by the appellant was his right to prove his innocence under North Carolina v. Alford, 400 U.S. 25. That was certainly one of the issues, but neither answering brief so much as addresses the underlying procedural questions which present issues quite different from the Alford issue.

Illustrative of the complete failure to deal with the procedural questions with any degree of seriousness is the Bar Association brief (at p. 27). There it discusses the question of the injection of the Canadian trip into proceedings and simply dismisses appellant's contention as to lack of notice on that issue by the assertion that appellant himself had brought the matter up. But appellant had cited In re Ruffalo, 390 U.S. 544 (1968), in support of his argument. Without citing or taking note of that case, the Bar Association makes an argument which is precisely--literally a carbon copy--of what the Supreme Court rejected in Ruffalo, i.e., that the lawyer brought up the new matter himself in the disbarment proceedings.

The Bar Association brief (at p. 24) quotes from the Appellate Division decision in this case, in which the Appellate Division in turn quoted from a portion of the record in the Maryland proceeding. The purpose of this quotation is to try to dispute appellant's contention that he had asserted his innocence in Maryland. But the quotation is truncated and wholly misleading.

Omitted from the brief and the Appellate Division quotation are other portions of the record in which it is made clear that the only issue at that time was whether Mr. Turco would personally take the stand; there was no question but that in Maryland he adhered to his position of innocence and asserted that he would produce a series of witnesses other than himself who supported that contention.

Thus, directly after the colloquy quoted in the Bar Association brief, there appears the following:

"THE COURT: Would the State please repeat is position made at the bench.

MRS. O'CONNOR: The State would request that the portion of the transcript be deleted from the last witness stated by Mr. Kunstler, whom I believe was Mr. Clark's testimony as Mr. Clark would give it [the last of a series of proferred witnesses before Mr. Turco], from there on out the State would request any testimony given by Mr. Turco, any reason asserted by Mr. Kunstler on behalf of Mr. Turco be deleted from the record.

MR. KUNSTLER: I have no objection.

THE COURT: The record will disclose Mr. Turco individually is making no assertion concerning his own participation in the case. Is that correct?" (Tr. 41-42)

The foregoing makes it absolutely clear that at issue was not whether Mr. Turco asserted his innocence in Maryland; rather, it was whether he would be permitted to state what he would personally have said.

Beyond this, however, is the fact that the entire basis for disbarment by the Appellate Division was the prosecutor's unsupported statements of what she intended to prove. In the disbarment opinion of the Appellate Division (47a), these became "facts," though her statement was never subjected to cross-examination or confrontation.

The failure of the briefs of respondents to address the due process questions in this case--as well as the failure of the District Court to address the issues*/--emphasizes what we have said above in our discussion of the res judicata issue.

*/ The Appellate Division's brief acknowledges the failure of the District Court to address the procedural issues (p. 3).

It also underscores our suggestion to the Court (p. 31, our brief) that perhaps a remand to the District Court is appropriate so that the District Court could at least pass upon the issues. The District Court's determination of this question on a motion to dismiss, its silence on the issue in its opinion, and the failure of respondents now even to address the question understandably leave this Court in a position where it perhaps considers that the issues have not adequately been dealt with. Certainly appellant has done everything in his power to obtain an informed adjudication of the issue. Remand may be an appropriate remedy so that the serious constitutional issues can be fully developed.

IV.

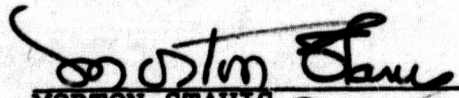
THE ALFORD ISSUE AND THE EQUAL PROTECTION QUESTION ARISING OUT OF THE DENIAL OF A RIGHT TO APPEAL TO LAWYERS SUBJECT TO DISCIPLINE BY THE NEW YORK COURTS

Appellant does not believe it necessary to reply to the respondents' briefs on these issues since his position is fully stated in his main brief.

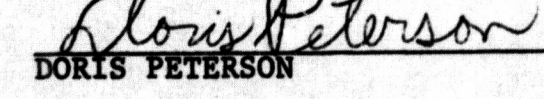
CONCLUSION

The decision of the court below should be reversed or, in the alternative, the case should be remanded for a consideration by the lower court of the constitutional issues presented.

Respectfully submitted,



MORTON STAVIS



DORIS PETERSON

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 1976, I served two copies of the within Reply Brief on Behalf of Appellant upon the following, by certified mail, return receipt requested, with sufficient postage affixed:

William J. Kogan, Esq.
Assistant Attorney General
Department of Law
Albany, New York 12224
Attorney for Appellate Division, et al.

Michael T. Tomaino, Esq.
Lincoln First Tower
Rochester, New York 14603
Attorney for Monroe County Bar Association